89-1270

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS R. MCNELL
AND
SAMUEL MCNELL,

Petitioners,

v.

MAX HUGEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Is it constitutional for a court to assert personal jurisdiction over a nonresident defendant who had no contact with the forum state, but who provided information to a newspaper in another state, which published a defamatory article about the plaintiff, which in turn was disseminated to the forum state by other media?

2. Where a nonresident defendant has been served by publication but has failed to appear, and the plaintiff has obtained a default judgment which the defendant now challenges for lack of personal jurisdiction, is the defendant precluded from controverting the jurisdictional allegations in the plaintiff's complaint?

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The petitioners, THOMAS R. McNELL and SAMUEL McNELL, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on September 21, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 886 F. 2d 1 (1st Cir. 1989), and is reprinted in the appendix hereto, p. A-1, *infra*.

The order and opinion of the United States District Court for the District of New Hampshire is not yet reported. It is reprinted in the appendix hereto, p. B-1, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on September 21, 1989, affirming the judgment of the United States District Court for the District of New Hampshire. The Court of Appeals denied a timely petition for rehearing on November 7, 1989.

This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

New Hampshire RSA 510:4 Nonresident Defendant.

I. JURISDICTION. Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

STATEMENT OF CASE

This is an action for libel and slander. The jurisdiction of the United States District Court for the District of New Hampshire was invoked under 28 U.S.C. § 1332 because of diversity of citizenship. The complaint alleged that the plaintiff was a citizen of New Hampshire and the defendants were citizens of New York and New Jersey, respectively.

The lawsuit arose from a front-page article about Max Hugel which appeared in *The Washington Post* on July 14, 1981, under the headline "CIA Spymaster is Accused of Improper Stock Practices." Hugel had recently been elevated to the position of Deputy Director of Operations of the Central Intelligence Agency. The article detailed extensive insider trading and other questionable activities in which he had allegedly engaged as a businessman several years earlier. The source of this information was Tom McNell.

The McNells, who are brothers, were Wall Street stockbrokers for many years. Early in 1974 their firm, McNell Securities Corp., agreed to become a "market maker" for over-the-counter stock in Brother International Corp., of which Hugel was president. For a period of about a year the McNells had very close and continuous business dealings with Hugel. As the stock market fell during the recession in late 1974, however, their relationship deteriorated rapidly. Hugel began making violent threats (including death threats), particularly to Tom McNell. (App. 110-112).[1] Frightened by these threats, McNell began surreptitiously tape-recording their telephone conversations.

In 1980 Hugel joined the Reagan Presidential campaign. After Reagan was elected President, in January 1981 Hugel

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[1] References to the Appendix in the record below are designated "App." References to the Appendix in this Petition are designated "A" and "B".

was appointed to an administrative position in the Central Intelligence Agency, under Director William Casey. In May 1981 Casey promoted him to the job of Deputy Director of Operations of the C.I.A., an extremely powerful position whose responsibilities include covert operations. The appointment shocked the intelligence community and was heavily criticized. (App. 49).

Tom McNell attempted to warn the Reagan administration not to keep Hugel in this position, because of his unsavory background. McNell made several telephone calls to the White House but was unable to make contact with anyone to whom he could speak candidly about his knowledge of Hugel. (App. 111-112). He then met with Bob Woodward and Patrick Tyler, reporters for *The Washington Post*, and told them what he knew about Hugel. At this meeting he also turned over to Woodward a quantity of documents and the tape-recordings of many of his conversations with Hugel.[2]

Before publishing the article about Hugel, the *Post* gave him an opportunity to contradict the specific allegations made by Tom McNell. He acknowledged the voice on the tapes was his, but issued a terse statement which said, "I deny any wrongdoing." (App. 43-44). On the same day the article was published, he resigned from his position at the C.I.A. Also on the same day, Tom and Sam McNell disappeared from public view. By the end of the year it had been widely reported, and was apparent, that they had fled and were in hiding. Whether they were fleeing from Hugel, or because they feared criminal prosecution in connection with an unrelated matter, is unclear.

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[2] The *Post* article refers to both Tom and Sam McNell as sources, and Hugel's default judgment runs against both. Because Tom was in fact the sole source of the information in the *Post* article, however, this Petition will so indicate throughout. (App. 112, 114-115).

In November 1982 Hugel commenced this lawsuit for libel and slander. He never sued *The Washington Post*, which had written and published the defamatory article and which stands by the truth of that article. (App. 217-223). Instead, he brought suit in New Hampshire against the *source* of the information in the *Post* article. He obtained service by publication and secured a default judgment against the McNells on September 25, 1984, in the amount of $931,000. They were not even aware of the lawsuit until 1987, at which time they filed a motion for relief from judgment.

The District Court denied the motion, citing *Calder v. Jones*, 465 U.S. 783 (1984) for the proposition that the McNells had sufficient contact with the State of New Hampshire to support its exercise of personal jurisdiction. The First Circuit affirmed, also citing *Calder*. The court elaborated as follows:

> Reading Hugel's complaint in a manner consistent with *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), we conclude that the allegations in Hugel's are sufficient to enable the District Court of New Hampshire to assert in personam jurisdiction against the nonresident McNells. The complaint *sufficiently alleges* that the McNells actually directed their actions at a New Hampshire resident. The McNells knew that release of the allegedly false information would have a devastating impact on Hugel, and *it can be fairly inferred* that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant.

(Emphasis supplied). The court further observed that "this case illustrates that the perils of a collateral attack on jurisdiction include the inability to challenge the intendment of the complaint under *Conley*."

REASONS FOR GRANTING THE WRIT

Introduction

Both the District Court and the First Circuit decided the issue of personal jurisdiction solely on the strength of the unsworn allegations of Hugel's complaint, and deliberately ignored the affidavits submitted by Tom and Sam McNell. This raises the threshold question of whether a nonresident defendant, who seeks collaterally to attack a default judgment on the ground of lack of personal jurisdiction, is precluded from challenging the jurisdictional allegations in the plaintiff's complaint. The First Circuit has answered this question in the affirmative, in direct conflict with prior decisions of this Court and other Circuits.

Even if the McNells' jurisdictional challenge was properly so limited, the allegations in Hugel's complaint do not support personal jurisdiction under the tests elaborated by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), *Calder v. Jones*, 465 U.S. 783 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Conversely, if the courts below were incorrect in looking only to the allegations in the complaint, then the absence of personal jurisdiction is even plainer. The facts are that the McNells had no contacts whatsoever with New Hampshire, and took no actions aimed at New Hampshire.

Since *Keeton* and *Calder*, the Circuit Courts have decided a number of cases, like this one, involving the issue of personal jurisdiction in a defamation context. Because the determination of "minimum contacts" in each such case necessarily involves factual issues peculiar to the case, the decisions cannot be said to be in direct conflict. Nevertheless, the First Circuit differs so widely from the other Circuits in the application of *Keeton* and *Calder* that a conflict in principle exists as to whether, and

under what circumstances, a mere source of information can be sued for defamation in any state where an article incorporating that information is subsequently published. Because the issue has important First Amendment ramifications and is likely to recur frequently, it is ripe for decision by this Court.

I. The Decision Of The First Circuit In This Case, Regarding The Issue Of Collateral Attack On Jurisdiction After A Default Judgment, Is In Direct Conflict With Decisions Of The Supreme Court And Other Circuit Courts.

Both of the lower courts in this case decided the issue of personal jurisdiction solely on the strength of the allegations in Hugel's complaint, and ignored the affidavits submitted by the McNells. In taking this position, the District Court relied upon no federal decisions, but upon two decisions of the New Hampshire Supreme Court. (B-5). In taking the same position, the First Circuit cited no authority except *Conley v. Gibson*, 355 U.S. 41 (1957). (A-8,9). *Conley* had nothing to do with personal jurisdiction, however; it was a class action brought by certain Negro employees under the Railway Labor Act, seeking to compel their union to treat them fairly. Instead, the First Circuit apparently cited *Conley* for the routine observation that the Federal Rules of Civil Procedure require only "notice pleading" in the form of a short and plain statement of the claim. Nothing in *Conley* even addresses, much less supports, the proposition that after a default judgment the jurisdictional allegations in the plaintiff's complaint are controlling and cannot be challenged by the defendant.

This proposition is a serious misapprehension of the law. If the unsworn, unsupported, and self-serving allegations in a plaintiff's complaint were dispositive of the issue of personal jurisdiction, then every nonresident defendant would have to appear and contest jurisdiction, or be bound by the plaintiff's allegations. Every complaint would begin with a routine recitation that the nonresident defendant had sufficient "minimum

contacts" with the forum state to support the constitutional exercise of personal jurisdiction, and that recitation would be binding on a defendant who elected not to appear, but to contest the court's jurisdiction collaterally. Such a result is absurd and contrary to law.

It is long settled that a nonresident defendant may refuse to appear in an action, take a default judgment, and then subsequently challenge the court's exercise of personal jurisdiction either in that court (the rendering court) or in another court where the judgment is sought to be enforced (the enforcing court). *Old Wayne Life Association v. McDonough,* 204 U.S. 8 (1906); *Butterworth v. Hill,* 114 U.S. 128 (1884). A default judgment which is invalid for due process reasons (such as lack of service or personal jurisdiction) is as invalid in the state of rendition as elsewhere. *McDonald v. Mabee,* 243 U.S. 90 (1917).

Furthermore, it is settled law that when a party seeks to rely, in a second judicial proceeding, upon the jurisdiction of another court in a previous judicial proceeding, the opposing party may not only challenge the jurisdiction of the prior court, but may fully try that issue in the second court. *Thompson v. Whitman,* 18 Wall. 457 (1873). In that case a New Jersey sheriff seized the fishing sloop of a New York citizen for illegally taking clams in New Jersey waters. Two justices of the peace in Monmouth County, New Jersey, after first determining that the seizure had taken place within that county, condemned the sloop and ordered her to be sold. The sloop's owner subsequently sued the sheriff for trespass in a New York court. The sheriff raised as a defense the fact that the sloop was seized pursuant to New Jersey law. He produced a record of the proceedings before the justices of the peace, which stated that the seizure had been made in Monmouth County, and asserted that this record was conclusive as to both the jurisdiction of the justices and the merits of the case.

The New York court disagreed, however, holding that the

record was only prima facie evidence, and allowed the sloop's owner to offer evidence to the contrary. The issue was fully tried to a jury, which found that the seizure was not made in Monmouth County. In affirming the decision below, this Court held that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the averments contained in the record of the judgment itself. *Id.*, at 469. The opinion further observed:

> But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.

Id., at 468. So, here, the allegations in Hugel's complaint are only a "slight form of words" which cannot nullify the McNells' right to inquire as to the jurisdiction of the New Hampshire court.

Thompson was not a default judgment case. The same principle applies with equal or greater vigor, however, to cases in which the defendant has taken a default judgment but seeks collaterally to attack the jurisdiction of the rendering court. In *Baldwin v. Iowa State Travelling Men's Association*, 283 U.S. 522 (1930), the defendant appeared specially to contest personal jurisdiction. Having done so and having lost after a full

hearing, the defendant was held bound by the finding of jurisdiction. This Court pointed out, however, that "[the defendant] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and *tried out* the issue in the present action, because it would never have had its day in court with respect to jurisdiction." *Id.*, at 525 (emphasis supplied).

The First Circuit's erroneous holding that a defaulted defendant cannot challenge the jurisdictional allegations in the plaintiff's complaint reflects a misunderstanding of the plaintiff's burden to prove the existence of personal jurisdiction. A plaintiff must not only plead but also prove the facts necessary to show the existence of jurisdiction. If those jurisdictional allegations are challenged by the defendant, the plaintiff must support them by competent proof, not by mere averments. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1934).

Not only is the First Circuit's decision in conflict with decisions of this Court, but is is also in conflict with the decisions of other Circuit Courts. *E.g., Covington Industries, Inc. v. Resintex A.G.*, 629 F. 2d 730, 732, 733 (2nd Cir. 1980); *Misco Leasing, Inc. v. Vaughn*, 450 F. 2d 257 (10th Cir. 1971).

II. The Decision Of The First Circuit In This Case, Regarding The Minimum Contacts Issue, Conflicts In Principle With Decisions Of The Supreme Court.

This Court has adopted the term "specific jurisdiction" to refer to situations where the lawsuit arises out of the defendant's activities in the forum state; and "general jurisdiction' to refer to situations where, although the cause of action does not arise in the forum state, the defendant's contacts with the forum state are so continuous and systematic that due process is not offended by permitting the courts of that state to exercise jurisdiction over the defendant. *Helicopteros Nacionales de Colom-*

bia, S.A. v. Hall, 466 U.S. 408, 414-416 (1984). In the present case it is clear that the McNells had no continuous and systematic contact with New Hampshire, so if there were jurisdiction it would have to be "specific jurisdiction."

This Court has also repeatedly emphasized that it is the contacts of the defendant – not the plaintiff – with the forum state which matter. There must be "some act by which the *defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (emphasis supplied). "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1957) (emphasis original). The Court has warned against the error of allowing the plaintiff's contacts with the forum to determine whether there is jurisdiction over the defendant. *Rush v. Savchuk,* 444 U.S. 320, 332 (1979).

An important distinction has evolved between cases in which the defendant's contact with the forum state (even if only a single act) was purposefully directed toward that state, and other cases where no such purposeful direction existed although the defendant might have foreseen his actions would give rise to consequences in the forum state. This distinction underlay the Court's decision in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). The case was a product liability action involving an Audi automobile. The car had been purchased new from a New York dealership by New York residents, who later moved to Arizona. En route to their new home, they had an automobile accident in Oklahoma and brought suit there against various parties, including the dealer and the regional distributor. In holding that the Oklahoma court had no jurisdiction over these defendants, this Court acknowledged that it was foreseeable that a car purchased in New York would cause injury in Oklahoma, but explained that the mere likeli-

hood that a product would find its way into the forum state does not confer jurisdiction there over the out-of-state dealer or distributor.

These basic principles of personal jurisdiction apply as well in defamation cases. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the plaintiff brought a libel suit in New Hampshire against Hustler, an Ohio corporation with its principal place of business in California. The record established that Hustler sold 10,000 to 15,000 copies of its magazine in New Hampshire every month. In the opinion of this Court, that fact was decisive in establishing jurisdiction:

> Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.

Id., at 781.

In *Calder v. Jones*, 465 U.S. 783 (1984), the plaintiff was a television actress who lived and worked in California. She brought suit there against the *National Enquirer*, a Florida publisher of a weekly tabloid newspaper, claiming to have been libeled by an article about her in the newspaper. The *Enquirer* answered the complaint and made no objection to the jurisdiction of the California court. Included as additional defendants were Calder, the president and editor of the *Enquirer*; and South, a reporter employed by the *Enquirer* whose byline appeared on the offending article. Both individual defendants were Florida residents, and moved to quash service for lack of personal jurisdiction.

From the record it appeared that the *Enquirer's* circulation exceeded 5 million, and 600,000 of those copies were sold each week in California. The reporter, South, travelled frequently to

California on business for the *Enquirer*, and his research for the article in question involved telephone calls to sources in California. Indeed, before publication he called Jones' husband there and read him a draft of the article over the telephone. As editor, Calder oversaw every function of the *Enquirer*. He reviewed and approved the topic of the article, and edited it in its final form. In upholding jurisdiction over them, this Court stated:

> Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and in which the *National Enquirer* has its largest circulation.

Id., at 789. In the present case, the persons analogous to South and Calder would be Bob Woodward and Ben Bradlee at *The Washington Post*, but Hugel did not sue them.

In the light of the foregoing decisions, it is instructive to review the total absence of contacts (let alone any purposeful direction of activity) between Tom McNell and the state of New Hampshire; as well as the factual differences between *Calder* and the present case:

(1) McNell had no connection whatsoever with New Hampshire: he did no business there, made no visits there, and derived no economic benefit from there.

(2) McNell was not in the publishing business at all; much less did he have any connection with any publisher whose publications were circulated in New Hampshire.

(3) McNell was not employed in any capacity by *The Washington Post*, nor is there any evidence that he

ever supplied information to the *Post* on any other occasion or had any other dealings of any kind with the *Post*.

(4) McNell received no consideration, monetary or otherwise, from *The Washington Post* in return for supplying information about Hugel.

(5) When he supplied information about Hugel to *The Washington Post*, McNell had no way of knowing whether any of it would ever be published. (That decision would presumably be made by the editor of the *Post*, who could have decided not to run the story for any number of reasons.)

(6) Hugel's complaint nowhere alleges that *The Washington Post* in general, or the July 14, 1981 issue in particular, was sold or circulated in New Hampshire.

(7) Hugel's complaint nowhere alleges that McNell knew or thought that *The Washington Post* was generally sold or circulated in New Hampshire.

(8) Hugel's complaint nowhere alleges that *The Washington Post* article ever even reached New Hampshire. (Instead, there is only a vague allegation, in Paragraph 29 of the complaint, that the statements about Hugel in the article were picked up by other news media and "distributed widely in communities throughout the nation, including the State of New Hampshire and other areas . . . .")

(9) Hugel's complaint nowhere alleges that McNell knew or thought that Hugel resided in New Hampshire.

(10) Hugel's complaint nowhere alleges that in July 1981 he did live in New Hampshire. (It alleges that he was

> a citizen and resident of New Hampshire as of November 1982, for purposes of establishing diversity jurisdiction, but that date is irrelevant to the question of where he lived – and McNell's activity was targeted – in July 1981).

In summary, in connection with the subject of this lawsuit Tom McNell made no visits or telephone calls to New Hampshire, nor did he send any letters or other communications there. He had no control over the dissemination of the defamatory statement to New Hampshire. He derived no economic benefit from New Hampshire, directly or indirectly. He was not aware that Hugel lived there. (Indeed, Hugel's complaint does not even allege that he did live there in July 1981, and one might suppose that he lived at that time in the Washington, D.C. environs.) No activity of McNells' was directed at New Hampshire. To the contrary, McNell's activities were plainly focused on Washington, D.C., where Hugel held high public office, where McNell tried to contact the White House, and where he did contact the *Post*.

In upholding the New Hampshire court's exercise of personal jurisdiction over the McNells, the First Circuit has based its decision solely upon the allegations in Hugel's complaint. The court's opinion inaccurately paraphrases the language of the complaint, however, and draws unsupported inferences not found in the complaint. The critical passage states:

> The complaint sufficiently alleges that the McNells actually directed their actions at a New Hampshire resident. The McNells knew that release of the allegedly false information would have a devastating impact on Hugel, and *it can be fairly inferred* that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant.

> Specifically the allegations in Hugel's complaint assert that the McNells gave the information to the *Washington Post* reporters with the intent that it be published and thus disseminated nationwide and cause damage to Hugel's reputation in New Hampshire.

(A-8; emphasis supplied). In fact, the complaint does not allege that Hugel was a New Hampshire resident in July 1981. Nor does it allege that the McNells' intention of damaging Hugel's reputation was targeted specifically on New Hampshire; rather, that intention was allegedly directed at "New York City, Washington, D.C., and the State of New Hampshire and diverse other communities and states and countries where the plaintiff had an established business and professional reputation." (App. 11). Finally, there is no support whatever for the "inference" that the McNells "intended the brunt of the injury to be felt in New Hampshire;" this is purely gratuitous and is nowhere alleged in the complaint.

The First Circuit's decision that the McNells had sufficient minimum contacts with New Hampshire is repugnant to the decisions of this Court regarding personal jurisdiction. *The Washington Post* may have purposefully availed itself of the privilege of conducting activities in New Hampshire, but the McNells did not. Unlike a manufacturer whose product is distributed nationwide, Tom McNell had no way of knowing that the information he gave to the *Post* would go anywhere at all, much less New Hampshire; he might have been dismissed by the *Post* as a crank. He derived no economic benefit from New Hampshire. He did not go there or communicate with anyone there. His acts were aimed at Washington, D.C. and hit the bullseye there; any effects elsewhere were unintended. On these facts it cannot fairly be said that he could have expected to be haled into court in New Hampshire.

III. The Decision Of The First Circuit, Regarding The Issue Of Minimum Contacts, Conflicts In Principle With The Decisions Of Other Circuit Courts.

There are at least four other Circuit Court decisions dealing with the issue of personal jurisdiction over a nonresident defendant who was the source of information for a defamatory article subsequently published by another party and disseminated in the forum state. To the extent that these decisions reveal a coherent pattern of reasoning, the First Circuit decision in the present case is in conflict with that pattern.

The first case, *McBreen v. Beech Aircraft Corporation,* 543 F. 2d 26 (7th Cir. 1976), antedated *Calder*. It was a libel action which grew out of an antitrust suit Beech had brought against several insurance adjusters, including McBreen. Beech's lawyer received a long-distance telephone call at his office in Wichita, Kansas from a reporter for *Business Insurance* who inquired about the antitrust suit. The lawyer provided information to the reporter, and soon thereafter an article appeared in *Business Insurance* describing the lawsuit. Among other places, the magazine was circulated in Chicago, Illinois, where McBreen's business was located. McBreen brought a libel action against Beech and its lawyer.

The Seventh Circuit held that the acts of the lawyer were insufficient to establish personal jurisdiction over him in the Illinois court. Among the factors which the court found dispositive were the fact that it was an isolated incident, since there was no evidence that the lawyer was in the habit of speaking to the press about his pending lawsuits; and the fact that he realized no financial gain or economic benefit from providing the information. Also, although he presumably knew that McBreen was located in Chicago, he allegedly was unaware that *Business Insurance* was published and circulated there.

A similar result was reached by the Ninth Circuit in *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F. 2d 1297 (9th Cir. 1985). The defendants issued to business and insurance publications, outside California, a press release which defamed one of the plaintiffs. The information in the press release was subsequently reported in publications distributed in California, and the plaintiff sued for defamation in that state. The Ninth Circuit held that the issuance of the press release, containing information which later was published in California, did not rise to the level of minimum contact required to establish personal jurisdiction. The court pointed out that neither defendant was a publisher and neither had "continuously and deliberately exploited" the California market. The opinion contains no discussion of the extent to which (if at all) the defendants' press release focused on the plaintiff or was targeted at California.

By contrast, the Fourth Circuit found that there was personal jurisdiction over the nonresident defendant in *Blue Ridge Bank v. Veribanc, Inc.*, 755 F. 2d 371 (4th Cir. 1985). Veribanc was a Massachusetts company which gathered and analyzed financial information provided by banks to the Federal Reserve Board, and sold its analysis to customers. Its analysis of information provided by Blue Ridge Bank led Veribanc to conclude that Blue Ridge was in financial trouble. This analysis was purchased by the *Chicago Tribune Syndicate* and provided to its syndicated financial columnist, who wrote an article stating that Blue Ridge would reach zero equity in eleven months. The article was published by the *Richmond Times-Dispatch* under the headline "Possible Bank Flops." Blue Ridge sued Veribanc in Virginia for defamation.

The Fourth Circuit upheld this exercise of jurisdiction on the ground that Veribanc was in the business of selling information, and an appreciable percentage of its business came from Virginia (determined by the court to be 1.42% of its total dollar volume). Furthermore, in connection with the sale of information in this case, Veribanc sent a letter to the syndicated colum-

nist which required him to attribute the information to Veribanc by name (and address) in any article he wrote. The court characterized this as a solicitation of business in Virginia, and concluded that Veribanc expected to receive additional orders from Virginia customers who read the article.

Sinatra v. National Enquirer, 854 F. 2d 1191 (9th Cir. 1988) was a conceptually similar case. The provider of information was a Swiss clinic or spa which provided false information to the *National Enquirer* about Frank Sinatra. The *Enquirer* then ran a cover article under the headline "Sinatra Injected With Youth Serum – He's Secretly Treated With Sheep Cells At Swiss Clinic." Sinatra sued the clinic and the *Enquirer* in California, where he lived. He settled with the *Enquirer* and obtained a verdict against the clinic, which challenged the court's exercise of personal jurisdiction.

The Ninth Circuit upheld the exercise of jurisdiction for the following reasons. A significant percentage of the clinic's United States clientele were California residents. The clinic did a great deal of advertising in California. The *Enquirer* had a very large circulation and California accounted for the largest share of that circulation, facts of which the clinic was well aware. It also knew that Sinatra was a California resident. Though the clinic provided the information about Sinatra without charge, it was intended that the wide dissemination of the information by the *Enquirer* would greatly benefit the clinic. Indeed, the court characterized the clinic's actions as a publicity effort designed to obtain free advertising which could reach millions of people in its target market, California.

All four of these cases involved nonresident defendants who, outside the forum state, provided information which was incorporated in an article published by a magazine or newspaper whose circulation extended to the forum state. The defendants did not visit or communicate with the forum state in connection

with the article, nor did they have anything to do with the writing of the article.

The courts applied similar criteria in determining whether or not the forum state could validly exercise personal jurisdiction. An important criterion was whether the providing of information by the defendant was an isolated occurrence, as in *McBreen*, or a regular practice, as in *Blue Ridge Bank*. Even more important was whether the information was provided gratuitously, or whether the defendant sought to derive an economic benefit from it, either directly as in *Blue Ridge Bank* or indirectly as in *Sinatra*. A third factor was the extent to which the information was targeted at the forum state; in this regard the difference between *Sinatra* and *Transure* is noteworthy.

These four decisions of the Fourth, Seventh, and Ninth Circuits establish a set of principles, for cases of this sort, with which the First Circuit's decision in the present case is markedly in conflict. Here, the act of Tom McNell in providing information to *The Washington Post* about a high C.I.A. official was targeted at Washington, D.C., not New Hampshire; Hugel did not even live in New Hampshire at the time. It was an isolated act by McNell, and unrelated to any commercial enterprise. He received no economic benefit of any kind, either direct or indirect, from any source – least of all from New Hampshire.

IV. This Case Has Important Implications For Freedom Of Speech And The Press.

For reasons expressed in *Calder v. Jones, supra,* at 790, this court has rejected the notion that First Amendment concerns should affect the analysis of personal jurisdiction; *e.g.,* by raising the threshold of "minimum contacts" in cases involving speech or the press. At the same time, jurisdictional cases which have First Amendment ramifications, like this one, present an additional dimension not found in the usual commercial context.

There is no question but that a newspaper or magazine of national circulation should be amenable to suit for defamation in any state where it is routinely circulated.

> Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated to forums so distant as to make collection of their claims difficult or impossible . . .

Buckley v. New York Post Corp., 373 F. 2d 175, 182 (2nd Cir. 1967). Conversely, a private individual who is the unpaid source of information in a newspaper article stands on a very different footing. He has no control over whether the story will be written, how it will be written, or how widely it will be circulated; nor does he obtain any remuneration or financial advantage from the publication of the article. Not only is it unfair to require him to respond to suit in any state where the article may ultimately be published, but such a rule would tend to discourage persons from coming forward with information.

The decision of the First Circuit in this case would establish the ominous proposition that any person who is a source of information which finds its way into a newspaper article is automatically subject to the personal jurisdiction of courts not only in every state where the newspaper is circulated, but also in every state to which secondary media may disseminate the story. This decision abandons the due process requirement of "minimum contacts" which has been the basic principle of personal jurisdiction since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Conclusion

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit to review the questions presented by this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1528

MAX HUGEL,

Plaintiff, Appellee

v.

THOMAS R. MCNELL, ET AL.,

Defendants, Appellants.

Appeal from the United States District Court
for the District of New Hampshire
[Hon. Martin F. Loughlin, *U.S. District Judge*]

ARGUED OCTOBER 4, 1988
DECIDED SEPTEMBER 21, 1989

Before
BOWNES, *Circuit Judge*, BROWN,* *Senior Circuit Judge*,
and BREYER, *Circuit Judge*.

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* Of the Fifth Circuit, sitting by designation.

JOHN R. BROWN, *Circuit Judge*.

I

Though the saga of the Hugel/McNell feud takes many twists and turns as does a good novel, we are faced with a very real problem which cuts to the heart of a federal court's ability to practice its trade, namely personal jurisdiction. The McNells challenge a default judgment against them in the District of New Hampshire District Court on the grounds that the court did not have personal jurisdiction over them. As sources of information leading to the publication of an article in the *Washington Post* which forced Hugel to resign his post as Deputy Director of Operations of the Central Intelligence Agency, the McNells argue that the default judgment against them is void for lack of personal jurisdiction. They assert that they do not have sufficient minimum contacts within the state of New Hampshire to support personal jurisdiction under N.H. Rev. Stat. § 510:4. [1]

Additionally, the McNells urge that service of process was insufficient and the district judge abused his discretion in denying F.R.Civ.P. 60(b) relief.

All the New That's Fit to Print

The relationship between Hugel and the McNells could easily be the basis of a television mini-series. We will confine our rendition of the facts to the bare minimum required for our

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[1] N.H. Rev. Stat. § 510:4 provides:

> Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within the state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

review of the instant litigation leaving interested readers in suspense until the release of the mini-series.

Hugel and Sam McNell entered into a limited partnership for the purpose of buying and selling securities. In the course of their business relationship, Hugel loaned Sam $377,000 which was secured by some Maine real estate. By September 1974 Hugel and Sam had terminated the limited partnership, and Hugel's relationship with both Sam and Tom McNell had gone sour. Sam's debt to Hugel remained unpaid, and Sam failed to pay Hugel proceeds of the insurance policy Sam collected when the house on the property securing the loan burned down.

In 1981, the bad blood between the McNells and Hugel still boiling, Tom McNell met with 2 Washington Post reporters and discussed allegations that Hugel was involved in illegal securities transactions. Hugel by that time had left his executive position with a New Hampshire corporation after his being appointed Deputy Director of Administration for the CIA. Tom gave the *Washington Post* reporters tapes of phone conversations with Hugel. Sam McNell also met with the reporters and substantiated allegations about Hugel.

The *Washington Post* on July 14, 1981 printed a front page article under the headline "CIA Spymaster Accused of Improper Stock Practices." The article was based on the tapes and information the McNells had provided. The Hugel story was quickly disseminated throughout the country via national news services and TV and radio networks. After this media blitz, Hugel resigned his CIA position. On the same day the McNells disappeared.

On November 3, 1982 Hugel filed the instant diversity suit against the McNells in the District of New Hampshire alleging two counts of defamation slander (Count I) and libel (Count II). Recognizing that neither of the McNells were residents of the Granite State (New Hampshire), Hugel filed a motion for serv-

ice without the state and requested service by publication. Thereafter process was served by filing on the Secretary of State, sending a copy of service to the McNells at their last known abodes, publication for three consecutive weeks in *The New York Times* and *Asbury Park Press*, and nationwide distribution of 2 press releases by United Press International.

The McNells, still in hiding, did not respond to Hugel's complaint. On February 24, 1983 a default judgment was entered against the McNells, and after a hearing on damages the district court on September 25, 1984 issued a judgment awarding Hugel $931,000.

In May 1987 the McNells surfaced – with the help of California law enforcement officers – and faced criminal charges of conspiracy to defraud the U.S. Government and interstate transportation of stolen goods. The McNells pleaded guilty and were sentenced to prison terms for these crimes.

On November 7, 1987 the McNells moved for relief from Hugel's default judgment under F.R.Civ.P. 60(b)(6). After a hearing, the district judge denied the motion and the McNells appeal that denial. Meanwhile, Hugel seeks Rule 11 sanctions against the McNells' legal counsel.

On appeal the McNells argue that (i) the district court lacked personal jurisdiction over them; (ii) insufficient service of process violated their rights to due process; and (iii) the district judge abused his discretion in denying their Rule 60(b)(6) motion for relief from judgment.

II

Personal Jurisdiction In the Granite State

In determining whether personal jurisdiction was properly

asserted over the McNells, the district judge first looked at the New Hampshire long arm statute. That statute confers jurisdiction over non-resident defendants who themselves or through an agent commit a tortious act in New Hampshire. N.H. Rev. Stat. § 510:4 (I). It is settled New Hampshire law that a party commits, for jurisdictional purposes, a tortious act within the state when injury occurs in New Hampshire even if the injury is the result of acts outside the state. *Tavoularis v. Womer*, 123 N.H. 423, 426, 642 A.2d 110, 112 (1983) (citing *Hall v. Coch*, 119 N.H. 639, 406 A.2d 962 (1979)). Therefore, even though the McNells' alleged acts of slander and libel actually took place physically outside the New Hampshire state lines, the district court properly found that the long arm statute applies because the complaint alleged that the McNells' defamation of Hugel resulted in injury to his business reputation within New Hampshire. Having passed that hurdle, we must proceed to the federal constitution to consider whether the New Hampshire federal court's assertion of personal jurisdiction over the McNells violates the due process clause under "traditional notions of fair play and substantial justice."[2]

III

Federal Constitutional Query[3]

Personal jurisdiction, and specifically the constitutionality of State application of long arm statutes, is a topic which over the

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[2] *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940).

[3] Contrary to the argument of Hugel, the McNells did not waive their objection to lack of personal jurisdiction. The McNells made no appearance prior to final judgment and thus never waived the defense of lack of personal jurisdiction by failure to raise it in a responsive pleading under F.R.Civ.P. 12 (g) & (h) (1). In their first appearance before the district judge (the motion to vacate the judgment), the McNells challenged the district court's exercise of

(Footnote continued on next page)

years has puzzled first year law students and learned jurists alike. The instant case adds yet another dimension to the puzzle.

In *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958), the Supreme Court instructed that a defendant corporation who "purposefully avails itself of the privilege of conducting activities within the forum State" has sufficient "minimum contacts" so that it can be haled into court within the forum State without violating the guarantees of due process. We then learned that foreseeability alone is not enough for a forum State to assert personal jurisdiction, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96, 100 S.Ct. 559, 566, 62 L.Ed.2d 490, 501-01 (1980) *unless* it "asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98, 100 S.Ct 559, 567, 62 L.Ed.2d 490, 502. Thus, in the so-called "stream of commerce" cases, courts must focus on the acts of the non-resident defendant to see if the defendant has a "substantial connection" with the forum State to support an assertion of personal jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226, (1957); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528, 542-43 (1985). The actions by the defendant must be "purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92, 104 (1987) (plurality opinion)

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[3] *continued*
personal jurisdiction. As such they never acquiesced to the district court's jurisdiction or waived their right to contest the assertion of personal jurisdiction. *See* 6 *Moore's Federal Practice* para. 55.09 ("where the court rendering the default judgment is shown to lack personal jurisdiction over the defendant, . . . the judgment may be vacated and set aside by the rendering court on motion, or by another court on collateral attack."); Friedenthal, Kane & Miller, *Civil Procedure* § 3.27 at 184 (1985); Ellington, *Unraveling Waiver by Default*, 12 Ga. L. Rev. 181, 185 (1978).

(citing *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528, 543; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790, 797 (1984)).

In its most recent tangle with a state long arm statute and the minimum contacts required to constitutionally assert personal jurisdiction, the Court proclaimed:

> The placement of a product into the stream of commerce without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . .But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi, 480 U.S. at 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92, 104.

Unlike the products liability cases from which most of the Supreme Court's pronouncements on personal jurisdiction and the application of state long arm statutes have evolved, the case at bar involves the intentional tort of defamation. The district court relied on *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804, (1984) to determine that the McNells had the requisite minimum contact with the State of New Hampshire to enable it to assert personal jurisdiction over the McNells. In *Calder* the Supreme Court considered the plight of an editor and reporter of the *National Enquirer*, a Florida corporation which publishes a weekly newspaper with nationwide circulation. The reporter and editor, Florida residents, were defendants in a libel action arising from an article which they respectively wrote and edited. The Supreme Court held that California could assert personal jurisdiction over the nonresident writer and editor because (i) their intentional actions were aimed at

the forum State, (ii) they knew that the article was likely to have a devastating impact on the plaintiff, and (iii) they knew that the brunt of the injury would be felt by the plaintiff in the forum State where she lived, worked and the article would have the largest circulation. *Calder*, 465 U.S. at 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804, 812. The knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tortfeasor could reasonably expect to be haled into the forum State's courts to defend his actions. *Id.*

Reading Hugel's complaint in a manner consistent with *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), we conclude that the allegations in Hugel's are sufficient to enable the District Court of New Hampshire to assert in personam jurisdiction against the nonresident McNells. The complaint sufficiently alleges that the McNells actually directed their actions at a New Hampshire resident. The McNells knew that release of the allegedly false information would have a devastating impact on Hugel, and it can be fairly inferred that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant.

Specifically the allegations in Hugel's complaint assert that the McNells gave the information to the *Washington Post* reporters with the intent that it be published and thus disseminated nationwide and cause damage to Hugel's reputation in New Hampshire. The intended result of the McNells' contact with the reporters and release of information to them, according to the complaint, was to impugn Hugel's honesty, integrity, and his ability to perform duties as either a public official or businessman.

The McNells urge that the intervening actions of the *Washington Post* and its employees after the McNells met with the reporters determined where their tortious acts were directed

and where the brunt of the injury would be felt. But the intervening actions of the reporters and editors of the *Washington Post* are irrelevant to the question of whether New Hampshire can exert personal jurisdiction over the McNells. The complaint alleges that the McNells committed an intentional tort, directed their actions toward the forum state, and knew that the brunt of the devastating blow caused by release of the allegedly libelous material would be felt in the State where Hugel resides and has an established reputation as a businessman and public servant. The district court correctly read the complaint as establishing that the McNells could reasonably expect to be haled into a New Hampshire court to answer for their conduct, and thus the assertion of in personam jurisdiction over the McNells satisfies the dictates of due process.[4]

IV

Service of Process

The McNells' insufficiency argument is essentially that though Hugel complied with the district court's order permitting substituted service, efforts to serve the McNells did not satisfy the requirements of due process. Specifically, the McNells contend that their failure to receive actual notice of Hugel's suit against them deprived them of an opportunity to be heard. The McNells do not claim that Hugel actually knew where they were hiding or could have by some means (presumably superior to those which the Federal Bureau of Investigation were unsuccessfully utilizing) located the McNells. Rather, they suggest that several alternative methods which the court could have ordered Hugel to employ would have succeeded in notifying the McNells of the pending suit.

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[4] This case illustrates that the perils of a collateral attack on jurisdiction include the inability to challenge the intendment of the complaint under *Conley*.

We cannot agree with the McNells' twisting of the doctrine that notice need not be actual, but rather reasonably calculated to notify parties of the pending suit. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950). The McNells' suggested reading of *Mullane* would result in service by publication of a party who cannot be located being constitutionally deficient if one untried method of personal service *might* have been successful in notifying that party. To adopt this view would have the effect of abolishing use of publication as a last ditch effort to notify a missing party of an action against him. Requiring no stone be left unturned in attempting service on a missing person before service by publication can be invoked would, in the words of the district judge, "reward [the] defendants' action of flight. . . . Due process does not require [a] plaintiff to be a private investigator and determine the actual whereabouts of defendants before commencing an action. . . ." Manuscript opinion at 11. Substituted service by publication was appropriate given Hugel's efforts to effect personal service on the McNells and was constitutionally sufficient under *Mullane*.

V.

Rule 60(b)(6)

In challenging the district judge's failure to grant relief from the default judgment under F.R.Civ.P. 60(b)(6) the McNells argue: (i) Hugel used methods of service not reasonably calculated to notify them of the pending lawsuit; (ii) unusual circumstances forced the McNells to go into hiding and thus incur a default judgment; (iii) default judgments are to be avoided at all costs, especially in cases which affect the public interest and there is no prejudice to the plaintiff; and (iv) they have a meritorious defense.

In this Court, disposition of motions to set aside default judgments is within the sound discretion of the district judge, and

his decision will not be overturned unless clearly wrong. *Bond Leather Co. v. O.T. Shoe Mfg. Co.*, 764 F.2d 928, 938 (1st Cir. 1985); *Taylor v. Boston & Taunton Transp. Co.*, 720 F.2d 731, 732 (1st Cir. 1983); *American Metals Service Export Co. v. Ahrens Aircraft, Inc.*, 666 F.2d 718, 720 (1st Cir. 1981). The district judge is best placed to weigh the arguments of the parties and the equities of the situation, and thus his decision should be accorded deference. *Bond Leather Co.*, 764 F.2d at 938 (citing *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 983 (1st Cir. 1978)). While a party seeking to set aside a default judgment must show good cause for the default and the existence of a meritorious defense, *Bond Leather*, 764 F.2d at 938, it is well settled that Rule 60 (b) (6) allows a district judge to grant relief when equitable considerations so counsel. *See generally* 11 Wright & Miller, *Federal Practice and Procedure* § 2864 (1973 & 1989 Supp.).

The district judge rejected the McNells' first 3 [(i)-(iii)] arguments after determining that the failure to receive notice and the need to go into hiding resulted from the McNells' own actions.[5] The district judge simply did not believe the McNells' portrayal of themselves as victims of circumstances and the misdeeds of Hugel. It is this type of determination which the district judge is in the best position to judge, and we see no reason to overturn his judgment.

Since existence of a meritorious defense does not require a default judgment to be set aside, we need not decide whether the McNells would have prevailed at trial if indeed they had opted not to evade, in both a civil and criminal sense, the long arm of the law. The district judge correctly determined that he could deny the McNells' Rule 60(b) motion without analyzing the meritorious defense argument.

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[5] *See* part IV *supra*.

In summary, though courts have traditionally favored deciding cases on the merits over the imposition of default judgments, the instant case is one instance when a default judgment is appropriate, or at least not inappropriate. The McNells' arguments of lack of personal jurisdiction and insufficient service fail to carry the day, nor did the district judge abuse his discretion by refusing to grant their Rule 60(b) motion for relief from judgment.[6]

AFFIRMED.

[6] We decline to impose sanctions, as requested by Hugel, against the McNells and their attorneys.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1528

MAX HUGEL,
Plaintiff, Appellee

v.

THOMAS R. McNELL, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: September 21, 1989

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1528

MAX HUGEL,
Plaintiff, Appellee

v.

THOMAS R. McNELL, ET AL.,
Defendants, Appellants.

BEFORE

Campbell, *Chief Judge,*
Brown,* *Senior Circuit Judge,*
Bownes, Breyer, Torruella and Selya, *Circuit Judges*

ORDER OF COURT

Entered: November 7, 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc both be denied.

By the Court:
Francis P. Scigliano
Clerk

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* Of the Fifth Circuit, sitting by designation.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Max Hugel

v. #C-82-615-L

Thomas R. McNell, et al.

Order on Motion For Relief From Judgment

This is an action for libel and slander which was commenced in this court on November 3, 1982. After attempts of substituted service upon defendants were made, as well as notice by publication, no one entered an appearance on behalf of either defendant. Accordingly, this court entered default judgment against both defendants on February 24, 1983. After a period of discovery, damages in the amount of $931,000 were recommended by the Magistrate on September 20, 1984, and approved by the court on September 25, 1984. Before this court is defendants' motion for relief from judgment pursuant to Fed. R. Civ. P. 60 (b). This court's jurisdiction is based on 28 U.S.C. § 1332.

Facts

In 1972, plaintiff became president of Brother International Corp., a marketing organization for Brothers Industries, Ltd., a Japanese corporation. Brothers' stock began trading publicly in 1972. In September, 1974 plaintiff met defendant Thomas R. McNell, owner of McNell Securities Corp., a financial advisor and market maker. Thereafter, plaintiff was introduced to defendant Samuel F. McNell and entered into a limited partnership with Sam McNell for the purpose of buying and selling securities and commodities. From May, 1974 to August, 1974 plaintiff loaned Sam McNell $377,000 which was secured by

real estate in Maine. On September 16, 1974 the limited partnership terminated and plaintiff's relationship with both defendants became acrimonious. Defendants began tapping phone conversations with plaintiff and defendants' attorney threatened suit for certain securities violations. Plaintiff continued pursuing collection of debts owed by both defendants.

Plaintiff resigned from Brothers International Corp. in April of 1975 and subsequently became Executive Vice President of Centronics Data Computer Corp. of Hudson, New Hampshire.

In January, 1977 a Maine home owned by defendant Sam McNell burned down. Plaintiff had a secured mortgage on the property and a check in the amount of $119,000 was distributed by defendant's insurance company. Plaintiff, however, was not informed of the proceeds and defendant Sam McNell subsequently cashed the check.

Plaintiff became interested in politics during the 1980 presidential election. Plaintiff endorsed the candidacy of soon to become President, Ronald Reagan. In fact, plaintiff was an instrumental factor in sending President Reagan to the White House. Thereafter, plaintiff was appointed Deputy Director of Administration for the Central Intelligence Agency (CIA) in February, 1981. In May, 1981, to the surprise of many, including top White House aides, plaintiff was appointed Deputy Director of Operations (DDO). As DDO, plaintiff was in charge of United States Government covert operations. It is no secret the DDO is one of the most highly sensitive positions in the government.

In July, 1981, upon learning of plaintiff's appointment, Thomas McNell met with reporters of the *Washington Post* concerning allegations of plaintiff's unlawful security violations. Defendant Thomas McNell hand-delivered tapes of phone conversations with plaintiff. Allegations concerning plaintiff were substantiated by defendant Sam McNell. Plaintiff was given

the opportunity to refute the allegations and expeditiously issued a press release describing such allegations as unfounded. However, the *Washington Post* after having an opportunity to refute the allegations and issuing a release describing such allegations as unfounded, the *Washington Post* printed the story on July 14, 1981. The story was printed on the front page with the following heading: "CIA Spymaster Accused of Improper Stock Practices."

On the same day as the Washington Post article, plaintiff resigned his sensitive position as DDO citing the interests of the President and CIA Director William Casey. Also on that day both defendants disappeared from sight after absconding with over $3,000,000 in funds belonging to Triad Energy Corp., which defendants controlled. On July 23, 1980 the SEC suspended trading of Triad stock. On August 12, 1981 arrest warrants were issued by the FBI charging both defendants with bank larceny. For the next 5 1/2 years defendants remained at large.

On November 3, 1982 plaintiff filed his complaint with this court charging both defendants with libel and slander. Thereafter, plaintiff filed a motion for service without the state and requested service by publication which was ordered on November 10, 1982. Plaintiff served process by filing on the Secretary of State and sending a copy of service by registered mail to both defendants last known abodes. Plaintiff further attempted service by publication for three consecutive weeks in the *New York Times* and *Asbury Park Press*. Plaintiff also issued press releases that were distributed nationwide by UPI on December 5 and 6, 1982. On January 3, 1983 plaintiff filed affidavits of service on non-resident defendants.

On January 14, 1983 plaintiff moved for default judgment which was granted by this court on February 24, 1983. On September 25, 1984 this court issued a judgment awarding plaintiff $931,000.

On May 16, 1987 defendant Thomas McNell was arrested in California and on May 18, 1987 defendant Sam McNell turned himself in. After pleading guilty to charges on conspiracy to defraud the United States government and interstate transportation of stolen property, both defendants were sentenced to prison terms.

Defendants' motion asks that this court set aside default judgments entered in this case. As grounds for their motion, defendants contend the following: That this court lacked personal jurisdiction over defendants; that the allegations in the complaint are insufficient to establish diversity of citizenship, and that relief should be had pursuant to Fed. R. Civ. P. 60 (b) (6). This court will address each contention individually.

I. In Personam Jurisdiction

Defendants contend that the New Hampshire long-arm statute, R.S.A. § 510:4, does not permit out-of-state service on either Thomas or Sam McNell because the tortious acts alleges occurred in Washington, D.C. Furthermore, defendants contend that sufficient minimum contacts necessary to subject defendants to jurisdiction within New Hampshire are lacking. See *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

> In determining whether or not it may exercise *in personam* jurisdiction over a foreign defendant, a court must typically engage in a two-part inquiry. It must first determine whether the State's long-arm statute authorizes such jurisdiction. *Weld Power Industries v. C.S.I. Technologies*, 124 N.H. 121, 124, 467 A.2d 110, 570 (1983); *Tavoularis v. Womer,* 123 N.H. 423, 426, A.2d 110, 112 (1983); *Cove-Craft Industries v. B.L. Armstrong Co. Ltd.,* 120 N.H. 195, 198, 412 A.2d 1028, 1030 (1980). If the long-arm statute would establish jurisdiction over the defendant, the court must further ask whether the defendant has "minimum contacts" with the state sufficient to insure that

> suit against him there does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted); *see Hall v. Koch*, 119 N.H. 639, 644, 406 A.2d 962, 965 (1979). The plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant. *Weld Power Industries, supra* at 123, 467 A.2d at 469; *Kibby v. Anthony Industries, Inc.*, 123 N.H. 272, 274, 459 A.2d 292, 293-294 (1983). In determining whether this burden has been met, the court will take facts that the plaintiff has properly pleaded as true and will construe reasonable inferences therefrom in the manner most favorable to the plaintiff. *Weld, supra; Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 610, 392 A.2d 576, 578 (1978); *Bell v. Pike* 53 N.H. 473, 475 (1873).

Phelps v. Kingston, No. 87-036 (N.H. Dec. 7, 1987).

RSA 510:4, I, the New Hampshire long-arm statute that confers jurisdiction over individuals, provides that:

> Any person who is not an inhabitant of this state and who, in person or through an agent transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

It is undisputed that defendants were not inhabitants of New Hampshire at any time relative to this complaint.The first step in this in personam jurisdiction test, therefore, must be predicated on the commission of a tortious act within New Hampshire.

In the instant case defendants' alleged tortious acts – providing the story to the *Washington Post* – resulted in the publication of defamatory statements within the State of New Hampshire. This court opines, without any reservation, that the tortious acts alleged caused harm to plaintiff's reputation in New Hampshire. In *Tovoulans,* 123 N.H. at 426, it was held that "the fact that only the alleged injury occurred within the State does not preclude New Hampshire from subjecting a nonresident to their jurisdiction under the long-arm statute." Therefore, the requirements of RSA 510:4 I are met.

Having determined that defendants' conduct falls within the purview of RSA 510:4 I, we must now determine whether the exercise of jurisdiction over defendants comports with constitutional due process.

Defendants argue that "minimum contacts" are lacking since their only actions were to provide information to the *Washington Post* and they were not engaged in the business of disseminating news. Defendant' argument, however, misconstrues the doctrine of minimum contacts as applied to libel and slander cases. In *Calder v. Jones,* 465 U.S. 783 (1984), the United States Supreme Court held that the defendants, an editor and reporter of the National Enquirer, had minimum contacts with California "based on the 'effects' of their Florida conduct in California," even though the article was written and edited by defendants in Florida. The Court explained:

> [Defendants] knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, [defendants] must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.

Id. at 789-90. The Court also pointed out that jurisdiction over defendants was not based on their employee status but on

their individual actions as primary participants in the alleged wrongdoing. *Id.* at 790.

In the instant case, defendants are primary participants in the alleged libelous and slanderous communications. Upon providing the information to the *Washington Post*, defendants knew and intended that their statements would be published, circulated and distributed within the State of New Hampshire. Defendants intended plaintiff to suffer harm to his reputation and nowhere could the "effect" be more pronounced than in the state in which plaintiff lives.

At the time of the alleged incident, although plaintiff was an employee of the CIA, plaintiff maintained a residence in New Hampshire, was politically active within the State and established profitable business relationship within the State. A plethora of news articles emanated from the original *Post* article, many in newspapers with a wide circulation in New Hampshire. Under the circumstances, defendants must have reasonably anticipated being haled into court in New Hampshire to verify their statements. Therefore, having found minimum contacts within New Hampshire, personal jurisdiction is exercisable by this court.

II. Diversity of Citizenship

Defendants contend that diversity is lacking because the complaint alleges residency of defendants rather than citizenship. Furthermore, defendants claim that the complaint is defective because it alleges defendants' citizenship at the time of the matters in controversy rather that the time when the action was commenced. When the action was commenced, defendants were fugitives from justice.

The court finds that plaintiff's complaint alleges citizenship. Furthermore, the complaint specifically states that up until July 14, 1981, defendants were citizens of New York and New Jersey and became fugitives from justice after the alleged inci-

dent. It is axiomatic that a person's domicile, once acquired, remains until the intention to form a new domicile. *Holmes v. Sopuch,* 639 F.2d 431, 434 (1981). This court refuses to find that defendants' fugitive status gives rise to an intention to form a new domicile, or for that matter, place defendants in a non-domicillary capacity.

At the time of the matter in controversy, defendants were citizens of New York and New Jersey. At the time of the complaint, although defendants were fugitives from justice, their citizenship for diversity purposes remained the same. Plaintiff's complaint alleges defendants' fugitive status. Therefore, diversity of citizenship has been sufficiently established.

III. Notice

Defendants claim deprivation of their due process rights since defendants did not receive actual notice of the pendency of this action at any time prior to the entry of judgment.

Defendants contend that service could have been effectuated by leaving a copy of the complaint with any member of defendants' immediate families. Furthermore, defendants contend that service should have been accomplished by providing notice to New York and Maine Attorneys who had represented defendants in other matters.

It is well established that due process requires notice be given which is reasonably calculated to apprise those involved that an action has been filed and to give them an opportunity to present their claim. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 305 (1950). Due process does not require actual notice, nor does it require notice to next of kin, friends, attorneys etc. Due process is judged by the standard of reasonableness articulated in *Mullane.*

In the instant case, defendants were afforded notice comporting with the requirements of *Mullane.* Plaintiff utilized the

methods of service authorized by rule, statute and this court's orders. Notice by publication in the *New York Times* and *Asbury Park Press* was reasonably calculated to apprise defendants that an action had been filed. These newspapers have a very wide circulation in defendants' last known abodes. This court opines that reasonableness should be judged by plaintiff's actions rather than defendants' action of flight. Plaintiff published notice of the suit in both newspapers for three consecutive weeks. The record also indicates that, at plaintiff's insistence, UPI issued a nationwide press release on December 5 and 6, 1982.

This court refuses to reward defendants' actions of flight, especially when plaintiff's substituted service was reasonably calculated to give defendants notice of the pending action. Due Process does not require plaintiff to be a private investigator and determine the actual whereabouts of defendants before commencing an action in this court. Having said enough, defendants were afforded proper notice.

IV. Rule 60 (b) 6

Defendants contend that this court should use its equitable powers to vacate default judgments pursuant to Fed. R. Civ. P. 60 (b) 6. Defendants claim that their absence, which resulted in their default, arose from unusual circumstances. Specifically, defendants claim that their fear of plaintiff and his possible reprisals were the primary reason for hiding. The affidavit of defendant Thomas McNell recants perceived threats received from plaintiff. Defendants allude to Judge Broderick's remarks at defendants' sentencing hearing in which the proposition that defendants were apprehensive was taken very seriously. Furthermore, defendants reallege their claims of insufficient notice and failure to effect proper service.

Finally, defendant contends that Rule 60 (b) (6) relief is proper since defendants have a meritorious defense. Defendants contend, as they did before they joined the ranks of Rip

Van Winkle, that their allegations of insider trading and stock manipulation are supported by tape-recorded conversations with plaintiff. Defendants point to plaintiff's decision not to sue the *Washington Post* as indicative of plaintiff's picayune allegations. Therefore, defendants claim that their actions of hiding were justified and fundamental fairness requires this court to vacate the default judgment entered

It is true that "[a] default judgment is . . . a drastic sanction that should be employed only in an extreme situation." *Luis C. Forteza e Hijos, Inc. v. Mills,* 534 F.2d 415, 419 (1st Cir. 1976). It is also true, however, that "he who comes into equity must come with clean hands; and he who seeks equity must do equity." D. Dobbs, Remedies § 2.3 p. 44 n.14 (1973).

The undisputed facts establish that defendants vanished in the summer of 1981 after they had defrauded corporations with which they had business relationships. Defendants absconded with over $3,000,000 in funds belonging to Triad Energy Corp. The evidence establishes that defendants secreted their stolen funds out of the country before the July 14, 1981 article. Defendants remained fugitives for approximately six years. Defendants are now serving federal prison sentences for such actions.

This court does not find credible defendants' allegations of patriotic whistle blowing, driven into hiding by the fear of plaintiff's possible reprisals. Defendants feared the FBI, not plaintiff. To reward defendants for their embezzlement, flight and other criminal activity would be a grave injustice. Plaintiff's reputation has been harmed and whether or not defendants' defense is meritorious makes no difference here where plaintiff followed all the necessary steps in redressing an alleged wrong committed by fleeing felons. Relief from the default judgment will not be allowed.

The judgment entered by this court on February 24, 1983 against both defendants Thomas R. McNell and Samuel F. McNell stands. Therefore, defendants' motion for relief from judgment (Doc. #32) is hereby denied.

February 9, 1988

Martin F. Loughlin
U.S. District Judge